

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-733602-D1 AND ALL
OTHER SEAMAN'S DOCUMENTS

Issued to: Julio CRUZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1930

Julio CRUZ

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 9 July 1971, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for twelve months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as Second Cook and Baker on board the SS SANTA CLARA under authority of the document above captioned, on or about 17 October 1970, while the vessel was in the port of Buenaventura, Columbia, Appellant

- (1) did wrongfully strike the Chief Steward in the face; and
- (2) did wrongfully attack the Chief Steward with a knife, causing him bodily harm and injury.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of six members of the vessel's crew and various documentary evidence.

In defense, Appellant offered in evidence his own testimony, that of the former Second Cook and Baker of the vessel, and various documentary evidence.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He entered an order suspending all documents issued to Appellant for a period of twelve months outright.

The entire decision was served on 20 July 1971. Appeal was

timely filed on 28 July 1971.

FINDINGS OF FACT

On 17 October 1970, Appellant was serving as Second Cook and Baker on board the SS SANTA CLARA and acting under authority of his document while the ship was in the port of Buenaventura, Colombia.

In the early afternoon, he went ashore, with the Chief Cook's permission, to purchase some coffee for his personal use. While ashore he had several drinks of an alcoholic nature.

At approximately 1630, the Chief Steward found him in the galley in an apparently intoxicated condition. The Chief Steward informed Appellant that the latter was in no condition to perform his duties and ordered him to his room. When Appellant refused to comply with this order, the Chief Steward sought the assistance of the Chief Officer. As the Chief Steward and the Chief Officer escorted Appellant to his room, Appellant struck the Chief Steward in the face. The Appellant was subsequently left in his room and ordered to remain there.

At approximately 1700, Appellant returned to the galley. As the Chief Steward stepped from the passenger's dining room into the service pantry, Appellant attacked him with a knife, inflicting flesh wounds to the Chief Steward's chest, left arm and one finger of his left hand. Appellant pursued the Chief Steward into the passenger's dining room, where he was apprehended and disarmed through the efforts of the Officers' messman and a passenger. The Chief Steward was subsequently treated by a physician, who applied four sutures to the chest wound and three to the cut on his arm.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that

- (1) the Chief Steward provoked Appellant to strike him through the use of profane language; and
- (2) the Investigating Officer failed to sustain his burden of proof with respect to the second specification.

APPEARANCE: Rolnick, Tabak, Ezratty, and Huttner, New York, New York

OPINION

Appellant attempts to exculpate himself from responsibility for striking the Chief Steward by means of an allegation to the effect that he struck the Chief Steward only after the latter had directed a profane epithet at him. Actually, the findings of the Administrative Law Judge indicate that Appellant, rather than the Chief Steward, was guilty of the use of profanity. Nevertheless, it has long been held that verbal provocation does not excuse a battery. Thus, Appellant's first basis for appeal is totally without merit.

Appellant's second ground for appeal amounts merely to an assertion of his own factual allegations. He, in effect, pleads for a hearing de novo and a substitution of his allegation for the findings of the Administrative Law Judge. This would go far beyond the scope of appellate review in these proceedings. It is noted that the Administrative Law Judge was meticulous in the exercise of his responsibilities in this case. There is absolutely no basis for a finding that he abused his discretion relation to the credibility of witnesses and the assignment of weight to the various items of evidence.

Appellant objects most strenuously to the Administrative Law Judge's acceptance of the testimony of the Chief Steward in light of the latter's less than candid responses to questions as to his prior Coast Guard and criminal record. However, it is clearly within the Administrative Law Judge's discretion to accept some parts of a witness' testimony, while rejecting others. See e.g. Commandant's Decision 1405 (POWELL) citing Elwert v. United States, 231 F. 2d 928 (9th Cir. 1956). It is also noted that the testimony of the Chief Steward was, in all relevant respects, corroborated by the testimony of other witnesses.

Appellant's second ground for appeal is also based strongly upon his assertion that there is no testimony on the record as to any witness having actually seen the knife in Appellant's hand but the Chief Steward. Rather there was testimony that Appellant came at the Chief Steward with his right hand, that the knife was in his hand as he withdrew it and that the Chief Steward suffered injuries to his chest, arm and finger. Thus, Appellant, in effect, challenges the Administrative Law Judge's findings as being based upon circumstantial evidence. However, that such evidence may form a proper basis for finding the charge of misconduct proved is clear. See e.g. Commandant's Appeal Decision 1561 (CONKLIN). In short, the findings of the Administrative Law Judge are based upon substantial evidence of a reliable and probative nature and will not be disturbed on appeal.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 9 July 1971, is AFFIRMED.

C. R. BENDER
Admiral U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 22nd day of May 197 .

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